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possible to advance alternative arguments.³⁵ In particular it can be suggested that by selling the property the original landlord makes it impossible to fulfil his or her obligation under the option. The sale can therefore be analysed as an anticipatory breach of that obligation. That argument depends on how the option itself is analysed. It can be regarded as enforceable only so long as the original landlord remains owner and therefore automatically extinguished upon the transfer of the property. The alternative view, which accords with a general principle advanced by Gloag,³⁶ is that the original landlord remains bound and will therefore be liable for breach of contract when he or she cannot perform. If that second view is correct, however, the obvious issue is what the original landlord can do so as not to be in breach. The matter should be dealt with expressly in the lease. Assuming, however, it is not, then one answer is that to avoid breach the original landlord must refrain from transferring. This seems unacceptably restrictive. A second answer is that there can be transfer but the successor landlord must be made to agree that the option is binding upon him or her. The effect, however, would be to undermine the *inter naturalia* doctrine. For that reason, the present writer prefers the view that the option is only binding upon the original landlord so long as he or she is owner.

Andrew J M Steven
University of Edinburgh

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Personal Bar: Three Cases

*One-half the troubles of this life can be traced to saying yes too quickly and not saying no soon enough.*¹

The “trouble” which Scots law commonly throws in the way of the rash and the hesitant is of course a plea of personal bar. The three cases considered below come from different conveyancing contexts, but for all, in one way or another, the “trouble” came from “not saying no soon enough”. But as so often, the plea of bar ended in failure.

A. STATUTORY BAR AND LEASES

The first case involved the statutory form of personal bar as set out in section 1(3) and (4) of the Requirements of Writing (Scotland) Act 1995. In the decade since these provisions were enacted surprisingly little litigation has occurred. *The Advice Centre for Mortgages v McNicoll*² is the first case to offer extended analysis in relation to leases. The pursuers sought a declarator that they were tenants of a shop property, basing

³⁵ See in this regard the discussion of the position in England in S Tromans, “Options: as safe as houses?” (1984) 43 CLJ 55.

³⁶ W M Gloag, *Contract*, 2nd edn (1929) 264.

¹ Josh Billings.

² [2006] CSOH 58; 2006 SLT 591.

their claim on a series of unconcluded missives and an unexecuted lease. They argued that a real right had been acquired in terms of the Leases Act 1449, or alternatively, that the “landlord” was prevented by section 1(3) of the 1995 Act from withdrawing from the contract. In this connection they claimed that they had taken entry, paid rent, and carried out significant improvements. Further arguments regarding an option to purchase arising from the lease are considered elsewhere in this issue.³ Personal bar was not established (nor a right based upon the 1449 Act). Nevertheless, the judgement of Lord Drummond Young raised several important issues as to the operation of statutory bar.

(1) The application of section 1(3) and (4) to leases and missives of let

The statutory form of bar applies only to those rights listed in section 1(2)(a), namely contracts for the creation, transfer, variation or extinction of real rights in land; non-commercial gratuitous unilateral obligations; and certain types of trust.⁴ It cannot be used in relation to the rights listed in section 1(2)(b) and (c), namely the creation, transfer, variation, or extinction of a real right in land (as opposed to an obligation to undertake such juridical acts) and testamentary writings. However, this distinction between the constitution of contractual rights on the one hand and of real rights on the other is problematic with regard to missives of let and leases, which may encompass both.⁵ Leases both create the tenant’s real right (once they are registered or possession is taken), and also constitute a bilateral contract. Similarly, missives of let constitute a contract for the creation of the lease, but may equally form the basis for the real right.

In this case, Lord Drummond Young had little difficulty with regard to the lease. Since there had been an antecedent contract (albeit incomplete) followed by a separate lease, the former was clearly intended to embody the contract and the latter the real right. There was therefore no question of the provisions of the lease being validated by the statute.⁶

Furthermore, as the missives did not meet the criteria for s 1(3) and (4) in any event, issues of categorisation did not arise. However, Lord Drummond Young noted with equanimity the suggestion that the possible role of missives of let in creating a real right might exclude them from the ambit of statutory bar, even in respect of their contractual aspect.⁷ He observed that if an informal lease was in place, entry was taken and rent paid, then the lease would be construed simply as an annual lease – a “sensible result”⁸ without the intervention of bar. These remarks indicate the general sentiment underlying his judgment that “there is no need to give [the 1995 provisions] a liberal interpretation ... If parties do not adhere to the very simple requirements [of writing]

3 By Andrew J M Steven at 432 above.

4 Requirements of Writing (Scotland) Act 1995 s 1(3). The provisions do not extend to contracts etc not requiring writing under the 1995 Act, e.g. leases for less than one year: s 1(7).

5 See A McAllister, *Scottish Law of Leases*, 3rd edn (2002) para 2.5.

6 [2006] CSOH 58 at para 19.

7 Para 21, citing McAllister, *Leases* para 2.5.

8 Para 21.

that are now prescribed, they have only themselves to blame.”⁹ However, a reading of section 1 which prevents leases *and* missives of let from being validated by the actings of the parties ascribes a very much narrower scope to statutory bar than to its common law predecessor,¹⁰ and arguably misconstrues its wording. The focus of section 1(3) is the nature of the *right* to be rescued from challenge, not the nature of any *document* in which it happened to be expressed. If, therefore, the necessary evidence of agreement can be adduced – no matter what the format – and the conditions of section 1(4) are met, then the *contractual right* may be placed beyond dispute, although the statute cannot save the *real right* in this way where formal writing is wanting.

A further feature of this case was that the original proprietor, who had entered into missives and was designed as landlord on the draft lease, had moved on – the defender was its successor. In so far as the personal bar provisions relate only to the tenant’s personal right, preventing challenge to the validity of the contract rather than themselves creating the real right, there could be no issue here of the landlord’s successor being affected by them.¹¹

(2) The required sequence of events

(a) Consensus

In order for the personal bar provisions to operate, a completed (if informal) agreement must already exist.¹² *Advice Centre for Mortgages* suggests that consensus must have been achieved not only on the essentials of the lease, but also on any other matters “treated by one or both of the parties as significant”.¹³ On the facts, the incomplete missives disclosed agreement on entry, duration and rent, but the parties had not agreed on a further issue concerning the tenant’s option to purchase the premises. Lord Drummond Young held, therefore, that consensus had not been reached. For that reason also, bar could not be considered.¹⁴

(b) Referability of actings to the agreement

Section 1(4) further requires that, following upon informal agreement, “one of the parties has acted or refrained from acting in reliance upon it”. In this case, the putative tenants could not demonstrate that their actings were “referable”¹⁵ to the alleged agreement, since the chronology was wrong. The missive letters were exchanged, and the draft lease sent, several months *after* the actings (taking entry and refurbishing the premises) which were said to be in reliance upon the agreement.

The statutory wording does not stipulate that the agreement should have been the exclusive cause of such actings, and in this it reflects the pre-existing common law.¹⁶

9 Para 16.

10 And appears to exceed the intention of the Scottish Law Commission in proposing the legislation: see Report on *Requirements of Writing* (Scot Law Com No 112, 1988) paras 2.39-2.43.

11 Paras 17 and 23 per Lord Drummond Young.

12 Requirements of Writing (Scotland) Act 1995 s 1(3).

13 Para 9.

14 Para 21.

15 Para 33.

16 See *Stewart v Stewart* 1953 SLT 267.

Nevertheless, the causal connection must be unequivocal.¹⁷ In *Tom Super Printing Supplies Ltd v South Lanarkshire Council*,¹⁸ for example, where the pursuers invoked section 1(3) and (4) to validate a variation of a contract with the defenders, the actings in question could have referred equally to the original contract and so the provisions were held not to apply.

(3) The end of common law *rei interventus* and homologation

Section 1(5) of the 1995 Act states that the statutory form of bar superseded common law *rei interventus* and homologation in relation to the contracts and unilateral obligations listed in section 1(2)(a). However, it does not specifically disapply the common law rules in relation to the transactions specified in section 1(2)(b) and (c) – the creation, transfer, variation, or extinction of a real right in land etc. On one view, this leaves open the possibility that the common law rules remain in place for the latter category.¹⁹ Lord Drummond Young ruled otherwise: “I am of opinion that the plain meaning of subsection (5) is that the previous law of *rei interventus* and homologation is superseded in its entirety.”²⁰ His Lordship’s reading of the section also removed any uncertainty²¹ concerning the status of the controversial rule in *Errol v Walker*²² (in which it was held that an agreement could be constituted by the writ of one party taken together with evidence of the actings of both parties). The basic rule stated by section 1(2) is that, save as otherwise provided by section 1 (3) and (4), a written document, complying with section 2 of the Act, is required for the obligations listed there. It follows that, as Lord Drummond Young stated, the *Errol v Walker* rule “no longer represents the law”.²³

B. DELAY AND RELIANCE

In *Park Lane Developments (Glasgow Harbour) Ltd v Jesner*,²⁴ a dispute had arisen out of missives for the defender’s purchase of a flat within a new development. The missives provided for the conveyance of a car parking space, but the draft disposition eventually drawn up by the pursuers as sellers conveyed only a right of *pro indiviso* common ownership of the space. Accordingly the defender purported to rescind the contract on the basis of the pursuers’ material breach. In an action for implement the pursuers pled that, even if they had been in breach of contract, “the principles of personal bar, waiver or acquiescence” prevented the purchaser from rejecting the disposition as tendered.

17 Cf, on the common law, Bell, *Principles* § 26; *Stewart v Stewart* 1953 SLT 267 at 269 per Lord Guthrie; but see Scottish Law Commission, Report on *Requirements of Writing* (n 10) paras 2.42 for commentary on statutory wording.

18 1999 GWD 31-1496.

19 See, e.g., R Rennie, “Requirements of writing: problems in practice” (1996) 1 SLPQ 187 at 193-194.

20 Para 22.

21 See G Junior, “Requirements of Writing (Scotland) Act 1995 section 1(3) etc – the extent of the provisions” (1999) 67 *Scottish Law Gazette* 9 at 10.

22 1966 SC 93.

23 Para 30.

24 Glasgow Sheriff Court, 3 May 2006 (Sheriff C A L Scott).

At no point had the defender indicated positive acceptance of the title as offered, but he had taken a long time to say no. His agents did not query the disposition until one week before the date of entry, some nine months after conclusion of missives and six months after receipt of the draft deed. A deed of conditions, indicating common ownership of parking spaces in the development, had been registered after conclusion of missives and before the date of entry, although admittedly this did not appear to have been exhibited to the purchasers. Nevertheless, pleas of personal bar and waiver were rejected.

Reasonably enough, Sheriff Scott did not regard the defender's delay as excessive or misleading, on the basis that the objection had been raised prior to the settlement date. In addition, he appeared to accept the defender's argument that: "there was no indication that the pursuers had conducted their affairs on the basis that the right [to resile] had been abandoned. They merely continued with the transaction because...they were entitled to do so". This requires qualification in that it is questionable whether absence of reliance may always be regarded as decisive. In many situations A and B have been engaged in an ongoing interaction which A has the power to alter. If A fails to do so, B in the meantime has often been entirely passive, wishing only for the status quo to be maintained. Logically therefore, if B argues that A is barred from altering the status quo, B is unlikely to be able to demonstrate reliance in terms of positive action. To require reliance in the conventional sense is thus tantamount to excluding personal bar where this fact pattern occurs. In such circumstances, therefore, delay by A, coupled with other features of unfairness, has sometimes been sufficient to bring bar into play.²⁵ This is particularly true of the context from which (perhaps rather unaccountably) counsel drew the definition of waiver²⁶ – that of criminal procedure. If the accused (or a litigant in a civil case for that matter) delays unduly in taking a procedural step which would otherwise have been open to him or her, the prosecution cannot be said to rely on such delay, since it has merely carried on as before, and yet bar may nonetheless apply.

One further minor but important point arising from this case is that the pursuers referred to a "title pack" relating to the same development, exhibited to the defender's agents three months after conclusion of missives but in relation to a transaction with another client. It was not apparent whether this material revealed the status of the parking spaces, but, in any event, Sheriff Scott was not prepared to attribute any significance to it. Clearly personal bar cannot rest on a person's failure to respond to information specifically directed at another party – even if serendipity might have brought it his or her way.

C. REASONABLE RELIANCE

In *Ben Cleuch Estates Ltd v Scottish Enterprise*,²⁷ the problem was less a delay in saying no²⁸ than positive actions creating a false impression. An action was brought for

²⁵ E.g. *Banks v Mecca Bookmakers (Scotland) Ltd* 1982 SC 7 (delay in landlord bringing rent review).

²⁶ *Millar v Dickson* 2002 SC (PC) 30 at para 31 per Lord Bingham of Cornhill.

²⁷ [2006] CSOH 35.

²⁸ Issues of acquiescence and waiver were not explored in detail: see paras 156-157.

declarator that the break option in a commercial lease had not been validly exercised by the tenants: the required notice had been sent to Bonnytown Estates Ltd, when in fact the landlord was Ben Cleuch Estates Ltd, the parent company of which Bonnytown was a subsidiary. In its defence, the tenants argued, *inter alia*, that the landlord was barred from denying the effectiveness of the notice.

The main gist of the personal bar defence was that Ben Cleuch's agents had led the tenants to believe that Bonnytown was the landlord. Invoices for rent were sent in the name of Bonnytown, and miscellaneous correspondence and emails referred to Bonnytown in similar terms. However, as Lord Reed noted, "the fact that a representation has been made, and that the representee has acted in reliance on the representation, does not necessarily give rise to personal bar".²⁹ What is required in addition is that reliance upon the representation should have been reasonable:³⁰ would a reasonable person have been induced to act as the representee did?³¹ Given the value of the right at issue – a lease in which the annual rent was £210,700 – the break notice required considerable care. The tenants' solicitor, who served the notice, might have been expected to take the trouble to check all the correspondence relating to the lease, which would have disclosed the position. Moreover, his Lordship accepted the evidence of a director of Ben Cleuch as to his expectation that a person serving a formal notice of this nature would check with "primary sources such as the records at Companies House"³² – in other words the defenders' reliance was not only unreasonable but also unforeseeable. Declarator was accordingly granted.

This was a clearly a hard case. Lord Reed reflected that "an adventitious bonus" was being handed to the pursuers, "enabling them to take unmeritorious advantage of the defenders' error when they realised perfectly well that the defenders intended to exercise their entitlement under the break clause".³³ Nevertheless, this case demonstrates the important principle that the one party's inconsistency – or even impropriety – is not enough for personal bar. Fairness requires the conduct of both parties to be considered, and bar cannot apply if, in the assessment of the court which hears the facts, the other party has responded unreasonably.

Elsbeth Reid
University of Edinburgh

29 Para 148, by reference to *Gatty v MacLaine* 1921 SC (HL) 1 at 7 per Lord Birkenhead.

30 Para 149.

31 Para 150.

32 Para 154.

33 Para 138.